IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs May 22, 2007

STATE OF TENNESSEE v. MINDY HALL

Appeal from the Criminal Court for Sullivan County
Nos. S51,833 & S51,834 Phyllis H. Miller, Judge

No. E2006-01759-CCA-R3-CD - Filed August 13, 2007

The defendant, Mindy Hall, pleaded guilty to 11 counts of forgery, Class E felonies, *see* T.C.A. § 39-14-114 (2006), and 11 counts of identity theft, Class D felonies, *see id*. § 39-14-150, in case number S51,833. The defendant also pleaded guilty to 11 counts of forgery, *see id*. § 39-14-114, and 13 counts of identity theft, *see id*. § 39-14-150, in case number S51,834. Via plea agreement, the defendant received an effective three year sentence on each indictment to run consecutively to each other and consecutively to case numbers S49,945; S50,379; S50,758; and S50,835 and consecutively to a Virginia sentence. The defendant's total effective sentence for all Tennessee cases was 16 years, with ten years suspended and the six years in case numbers S51,833 and S51,834 to be determined by the trial court. After an evidentiary hearing, the trial court ordered the defendant to serve the six years in the Department of Correction. The defendant appeals the trial court's order and claims that the trial court erred in denying her full probation or some other form of alternative sentencing for these six years. We disagree and affirm the trial court's order; however, we remand for correction of errors in the judgments in case number S51,833.

Tenn. R. App. P. 3; Judgments of the Criminal Court are Affirmed and Remanded.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS and ALAN E. GLENN, JJ., joined.

Stephen M. Wallace, District Public Defender; and Leslie S. Hale, Assistant Public Defender, for the Appellant, Mindy Hall.

Robert E. Cooper, Jr., Attorney General & Reporter; Cameron L. Hyder, Assistant Attorney General; H. Greeley Wells, Jr., District Attorney General; and William Harper, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

At the evidentiary hearing, the defendant testified that she was 26 years old with a seven year old son, who lived with the defendant's mother. The defendant testified in essence that she did not have a steady employment history, that she had a drug problem, and that she "passed" the checks, which resulted in the forgery and identity theft convictions for both cases, to get money to obtain drugs. Also, the defendant had been incarcerated since March 30, 2005, and she testified that the incarceration "totally changed" her. Due to her incarceration, the defendant missed two of her son's birthdays and her father's funeral. The defendant further testified that she no longer ingested drugs even though illegal drugs were available to her in jail. Because she no longer ingested drugs, she had a new appreciation for her family.

The defendant further testified that if granted probation, she would live with her mother, take care of her son, and work while she furthered her education. The defendant's mother, Beverly Cross, testified that the defendant could live with her and that she would help the defendant meet the conditions of her probation. Ms. Cross further testified that if the defendant violated her probation, she would personally inform the defendant's probation officer of the violation.

The trial court found several enhancement and mitigating factors, including that the defendant garnered criminal convictions in addition to those necessary to establish the appropriate range and that the defendant had a previous unwillingness to comply with conditions of a sentence involving release into the community. The trial court also found that the defendant was not remorseful because she only expressed sorrow for her situation and not the victims' losses. In addition, the court stated that the defendant had not made efforts at self-rehabilitation; the defendant's only alleged rehabilitation had come while she was incarcerated. The court found that the defendant had a poor work and educational history and had violated probation. The court also found that the defendant was not eligible for community corrections because the defendant was to immediately return to Virginia to serve a sentence there.

Thus, the trial court ordered the defendant to serve her sentences in incarceration because of her criminal history and probation had been applied unsuccessfully to the defendant in the past. Finally, the trial court stated that the defendant must pay restitution which would be supervised by the Board of Probation and Parole.

The defendant argues on appeal that the trial court erred in denying her probation or some other form of alternative sentencing.

When there is a challenge to the manner of service of a sentence, it is the duty of this court to conduct a de novo review of the record with a presumption that the determinations made by the trial court are correct. T.C.A. § 40-35-401(d) (2006). This presumption is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). The burden of showing that the sentence is improper is upon the appellant. *Id*. In the event the record fails to

demonstrate the required consideration by the trial court, review of the sentence is purely de novo. *Id*. If appellate review, however, reflects that the trial court properly considered all relevant factors and its findings of fact are adequately supported by the record, this court must affirm the sentence, "even if we would have preferred a different result." *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

The mechanics of arriving at an appropriate sentence are spelled out in the Criminal Sentencing Reform Act of 1989. The court is required to consider (1) the evidence, if any, received at the trial and the sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct involved, (5) evidence and information offered by the parties on the enhancement and mitigating factors, (6) any statements the defendant wishes to make in the defendant's behalf about sentencing, and (7) the potential for rehabilitation or treatment. T.C.A. §§ 40-35-210(a), (b), -35-103(5) (2006).

We note that the defendant was statutorily eligible to serve a suspended sentence. *See* T.C.A. § 40-35-303(a) (2006). The determination of entitlement to full probation necessarily requires a separate inquiry from that of determining whether a defendant is entitled to a less beneficent alternative sentence. *See State v. Bingham*, 910 S.W.2d 448, 455 (Tenn. Crim. App. 1995), *overruled on other grounds by State v. Hooper*, 29 S.W.3d 1, 9-10 (Tenn. 2000). A defendant is required to establish her "suitability for full probation as distinguished from [her] favorable candidacy for alternative sentencing in general." *State v. Mounger*, 7 S.W.3d 70, 78 (Tenn. Crim. App. 1999); *see* T.C.A. § 40-35-303(b); *Bingham*, 910 S.W.2d at 455-56. A defendant seeking full probation bears the burden of showing that probation will "subserve the ends of justice and the best interest of both the public and the defendant." *State v. Dykes*, 803 S.W.2d 250, 259 (Tenn. Crim. App. 1990), *overruled on other grounds by Hooper*, 29 S.W.3d at 9.

Regarding probation, the trial court should consider the nature and circumstances of the offense, the defendant's criminal record, the defendant's background and social history, her present condition, including physical and mental condition, and the deterrent effect on the defendant. *See State v. Kendrick*, 10 S.W.3d 650, 656 (Tenn. Crim. App. 1999). The court should also consider the potential for rehabilitation or treatment of the defendant in determining the appropriate sentence. *See* T.C.A. § 40-35-103(5) (2006). Moreover, in *State v. Bunch*, 646 S.W.2d 158, 160 (Tenn. 1983), the supreme court held that truthfulness is certainly a factor which the court may consider in deciding whether to grant or deny probation.

In the present case, the trial court looked at the relevant considerations in determining whether to grant probation. Again, the trial court found that the defendant garnered a prior criminal record and violated probation. In addition, although the defendant claims the trial court did not consider her potential for rehabilitation, we discern that the court found that the defendant had not made any self-rehabilitative efforts; the only alleged self-rehabilitative efforts occurred during incarceration. Thus, in essence, the trial court determined that the defendant's potential for rehabilitation outside of incarceration was slim. The defendant also claims that the trial court should have placed greater weight on the fact that the defendant was remorseful; however, the trial court,

which is the sole judge of credibility, specifically found that the defendant was not remorseful about how her actions hurt the victims.

We cannot disagree with the trial court's implicit finding that the defendant failed to carry her burden of showing that probation would "subserve the ends of justice and the best interest of both the public and the defendant." *Dykes*, 803 S.W.2d at 259, *overruled on other grounds by Hooper*, 29 S.W.3d at 9.

The defendant also argues that the trial court erred in denying her an alternative sentence.

The defendant is a standard, Range I offender convicted of numerous Class D and E felonies. As such, she is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary. *See* T.C.A. § 40-35-102(6) (2006). However, this presumption does not entitle all offenders to alternative sentences; rather, it requires that sentencing issues be determined by the facts and circumstances presented in each case. *See State v. Taylor*, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987).

The presumption of favorable candidacy for alternative sentencing in general, which is applicable in the present case, may be overcome by showing that at least one of the conditions set forth in Tennessee Code Annotated section 40-35-103(1) is met. *See, e.g., State v. Jimmy Ray Dockery*, No. E2004-00696-CCA-R3-CD, slip op. at 3 (Tenn. Crim. App., Knoxville, Nov. 30, 2004). These considerations include:

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
>
> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterence to others likely to commit similar offenses; or
>
> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.

T.C.A. § 40-35-103(1) (2006).

Here, the trial court found that the defendant had violated probation and had garnered a criminal history, prior to and including the current numerous convictions. The defendant concedes that in addition to these two cases, which contain a total of 46 offenses, she has been convicted of four misdemeanor thefts, failure to appear, and two speeding tickets. The defendant also violated probation by failing a drug screen while incarcerated on another case. The record adequately supports these findings. *See State v. Charles Nathan Boling*, No. E2005-02858-CCA-R3-CD, slip op. at 5 (Tenn. Crim. App., Knoxville, Mar. 14, 2007) (upholding trial court's denial of alternative

sentencing where defendant garnered a "long" criminal history in addition to the 41 offenses to which he pleaded guilty, including convictions in Virginia for grand larceny, credit card fraud, and theft). Moreover, only one condition needs to be met to overcome the presumption. Thus, we affirm the trial court's order denying alternative sentencing.

Based upon the foregoing analyses, we affirm the trial court's judgments; however, we remand for the correction of clerical errors in the judgments in case number S51,833. Each judgment in each count for case number S51,833 shall reflect the actual offense date. In addition, count 11 shall reflect the conviction offense of forgery, *see* T.C.A. § 39-14-114 (2006), not identity theft, *see id*. § 39-14-150.

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JAMES CURWOOD WITT, JR., JUDGE